

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

PRIMO MARQUEZ)	
Claimant)	
)	
VS.)	
)	
METRO TILE CONTRACTORS, INC.)	
Respondent)	Docket No. 1,033,834
)	
AND)	
)	
BUILDERS ASSOC. SELF-INSURER'S)	
FUND OF KANSAS)	
Insurance Carrier)	

ORDER

Claimant requested review of the July 2, 2007, Preliminary Decision entered by Administrative Law Judge Robert H. Foerschler. Philip R. Carson, of Kansas City, Kansas, appeared for claimant. Wade A. Dorothy, of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

The Administrative Law Judge (ALJ) stated that it would "seem helpful to have some understanding of the disputed issues in the whole claim before making a decision as to extensive medical procedures with possible unfortunate outcomes are authorized."¹ Accordingly, he denied claimant's request for the recommended medical treatment but found that the current palliative treatment should be continued.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the May 10, 2007, Preliminary Hearing and the exhibits, the transcript of the discovery deposition of claimant taken May 4, 2007, the transcript of the deposition of Jenny Vogelmeier taken May 9, 2007, and the exhibit, and the transcript of the deposition of Doug Steward taken May 9, 2007, together with the pleadings contained in the administrative file.

¹ ALJ Preliminary Decision (July 2, 2007) at 1.

ISSUES

Claimant raises certain issues, specifically, whether claimant suffered personal injury by accident arising out of and in the course of his employment with respondent, whether proper notice was given pursuant to K.S.A. 44-520, whether claimant is entitled to the recommended medical benefits, whether claimant is entitled to temporary total disability compensation, whether respondent is responsible for medical bills claimant incurred for the treatment of his work-related injury, and whether the ALJ exceeded his jurisdiction by ignoring uncontroverted evidence of compensability and claimant's entitlement to temporary total disability compensation.

Respondent contends that the filing of claimant's application for review is premature and there is no jurisdictional basis for the appeal. Respondent argues that the ALJ has not yet ruled on the merits of the defenses it raised and, as such, the Board does not have jurisdiction to make the initial findings required to assess the validity of those defenses. Specifically, respondent denies that claimant met with personal injury by accident arising out of and in the course of his employment with respondent and further denies that proper notice had been given as required by K.S.A. 44-520. Respondent asserts that the ALJ did not exceed his jurisdiction in the July 2, 2007, Preliminary Decision, since an ALJ can decide whether to award or deny medical treatment and temporary total disability compensation. Respondent contends the Board should remand this matter to the ALJ to conduct whatever evidentiary proceedings he deems necessary in order to rule on the issues of compensability.

The issues for the Board's review are:

(1) Does the Board have jurisdiction over this appeal?

(2) Did the ALJ make findings and conclusions concerning the compensability of this claim and claimant's request for preliminary benefits? If not, should this matter be remanded to the ALJ for findings concerning whether claimant suffered an injury out of and in the course of his employment with respondent, whether claimant gave respondent the appropriate 10-day notice of his accident pursuant to K.S.A. 44-520, whether claimant is entitled to medical benefits and temporary total disability compensation, and whether claimant is entitled to have his medical bills paid by respondent for his "palliative treatment"?

FINDINGS OF FACT

Claimant filed his Application for Hearing on March 23, 2007, claiming lower back injuries on October 30, 2006; November 2006; and December 15, 2006, while working for respondent as a journeyman tile setter. Claimant indicated that he was injured while

mixing cement using a tarp, moving boxes of tile, and installing granite counter tops.² At the preliminary hearing held May 10, 2007, claimant's attorney verbally revised the dates of accident listed on the Application for Hearing, stating the first accident occurred on November 6, 2006; the second accident occurred on November 13, 2006; the third accident occurred in December 2006; and a fourth accident occurred on January 11, 2007.

Claimant's demand letter to respondent dated March 22, 2007, requested that it provide him with "medical treatment necessary to cure his injuries."³ Claimant filed an Application for Preliminary Hearing on April 9, 2007. At the preliminary hearing held on May 10, 2007, claimant also requested temporary total disability compensation. Respondent argued that the first documented medical record showing claimant making complaints of low back pain was on March 23, 2006, a time he was not working for respondent. Respondent denied that claimant was injured by accident arising out of and in the course of his employment. Respondent further argued that claimant did not provide it with the proper 10-day notice of accident as set out in K.S.A. 44-520.

At the preliminary hearing, testimony was taken of claimant concerning the facts of the accidents, his medical treatment, and his work history. An evidentiary deposition was taken of Doug Steward, claimant's supervisor, and of Jenny Vogelmeier, respondent's bookkeeper. Medical records from Dr. Dan Murphy, Dr. Steven Hess and Dr. Glenn Amundson were entered into evidence. Dr. Murphy believed surgery would not eliminate claimant's pain because his problems are so widespread in his low back. Dr. Hess also believed that surgery would not help claimant because his degenerative disc disease is such a multilevel problem. Dr. Amundson believed that claimant required a decompression at L1 to L5 and a discectomy at L5-S1 on the left. He did not feel that claimant showed significant instability or misalignment at L4-5 and did not believe a fusion was needed.

On May 15, 2007, the ALJ issued an order stating:

[I]t is fairly probable that [claimant's work] has been a major contributor to his current back problems and his present need, would be compensable, assuming no problems with reporting would bar it. [Citation omitted.]

But in his condition, there should be some professional concurrence in the potential benefit from the procedure proposed by Dr. Amundson before imposing the costs of the procedure in the industry fund. So a neutral physician should be selected and utilized to provide this.⁴

² Form K-WC E-1, Application for Hearing filed March 23, 2007.

³ Letter from claimant's attorney to respondent dated March 22, 2007, filed with the Division on April 9, 2007.

⁴ ALJ Preliminary Decision (May 15, 2007) at 2.

Dr. John Ciccarelli was selected to perform an independent medical examination (IME) of claimant. He examined claimant on June 19, 2007. After reviewing claimant's medical records, taking a history from claimant, and examining him, Dr. Ciccarelli noted that claimant had a "complex picture regarding his lumbar region."⁵ Dr. Ciccarelli opined:

Although [claimant] has radiographic abnormalities at multiple levels, I do not feel that the patient would benefit from surgery addressing all these levels. Based on my exam today as well as his verbalized complaints, I do feel he has in summary a lumbar instability problem with stenosis at 4-5 as well as a disc herniation and significant disc space narrowing with a frank extruded fragment at L5-S1. I feel that [claimant] may benefit from a lumbar decompression spanning L4-S1 to address his stenosis with possible discectomy at 4-5 and definitely at 5-1 to address his extrusion. Given his instability and back pain being his biggest complaint, I would also recommend concomitant fusion spanning L4-5 as well as to include L5-S1. . . .

. . . . His prognosis is extremely guarded with any surgery that could be entertained. . . . I do feel [claimant] did suffer a symptomatic aggravation of his underlying instability as well as possible disc herniation secondary to his activities on or around November 2006.⁶

The ALJ entered a Preliminary Decision on July 2, 2007, stating that Dr. Ciccarelli

. . . echos some of the same reservations as Dr. Amundson. Not the medical skills of the providers appears a problem but rather the candidacy of [claimant] for a successful enough outcome for such an extensive procedure.

Under these circumstances it would seem helpful to have some understanding of the disputed issues in the whole claim before making a decision as to extensive medical procedures with possible unfortunate outcomes are authorized. At the preliminary hearing it was suggested that possibly a different employer was more responsible for the injury [citation omitted] and respondent vigorously denies responsibility or proper notice.⁷

The ALJ then denied claimant's application for the recommended treatment "for the time being" and continued claimant's palliative treatment.⁸ Upon receipt of this Preliminary Decision, claimant's attorney wrote the ALJ asking for a decision on the issue of temporary total disability compensation and also asking if respondent was being ordered to pay for

⁵ Dr. Ciccarelli's report filed June 25, 2007, at 6.

⁶ *Id.* at 7.

⁷ ALJ Preliminary Decision (July 2, 2007) at 1-2.

⁸ *Id.* at 2.

the cost of the "palliative treatment" mentioned in the Preliminary Decision. In response, the ALJ issued a letter to claimant's attorney with a copy to respondent's attorney stating: "I can hardly believe you have suggested the addition of temporary total disability payable for [claimant] after reading the preliminary decision of July 2nd."⁹ The ALJ further stated:

As I mentioned in the decision, there are too many loose ends to be tied here before prolonged benefits can be ordered. If the union and employer agree to pay some weekly benefits to help [claimant] along they can have credit for it, but I am not going to order them to do it.¹⁰

PRINCIPLES OF LAW

The Board's jurisdiction to review a preliminary hearing order is limited. K.S.A. 2006 Supp. 44-551(i)(2)(A) states in part:

If an administrative law judge has entered a preliminary award under K.S.A. 44-534a and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing.

K.S.A. 44-534a(a)(2) states in part:

Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim, except that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues. A finding with regard to a disputed issue of whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board. . . Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

⁹ ALJ's letter to claimant's attorney dated July 20, 2007, at 1.

¹⁰ *Id.* at 1-2.

In *Allen*,¹¹ the Kansas Court of Appeals stated:

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.

When the record reveals a lack of jurisdiction, the Board's authority extends no further than to dismiss the action.¹²

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.¹³ Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.¹⁴

ANALYSIS

It is difficult to determine the ALJ's mind in this matter. Reading solely from the four corners of the ALJ's July 2, 2007, Preliminary Decision, it would appear that the ALJ found the claim compensable because he ordered the continuation of preliminary benefits in the form of palliative treatment. If this is correct, then the denial of additional medical treatment in the form of the surgery suggested by Dr. Ciccarelli does not give rise to a jurisdictional issue. This is also suggested from the ALJ's May 15, 2007, Preliminary Decision, which states:

As he described his work, it is fairly probable that it has been a major contributor to his current back problems and his present need, would be compensable, assuming no problems with reporting would bar it. [Citation omitted.]

But in his condition, there should be some professional concurrence in the potential benefit from the procedure proposed by Dr. Amundson before imposing the costs of the procedure in the industry fund. So a neutral physician should be selected and utilized to provide this. The parties agreement if possible to a candidate would be beneficial.¹⁵

¹¹ *Allen v. Craig*, 1 Kan. App. 2d 301, 303-04, 564 P.2d 552, rev. denied 221 Kan. 757 (1977).

¹² See *State v. Rios*, 19 Kan. App. 2d 350, Syl. ¶ 1, 869 P.2d 755 (1994).

¹³ K.S.A. 44-534a.

¹⁴ K.S.A. 2006 Supp. 44-555c(k).

¹⁵ ALJ Preliminary Decision (May 15, 2007) at 2.

But the letter to Dr. Ciccarelli for an IME not only requested his opinion on a course of treatment but also requested a causation opinion. Furthermore, it does not appear that respondent had authorized a physician to treat claimant, so the prior palliative care may have been unauthorized. It is not clear that the ALJ was ordering respondent to pay for the cost of the ongoing palliative care in his July 2, 2007, Preliminary Decision. There was no order by the ALJ concerning the payment of past medical treatment expenses.

Conversely, if the denial of the “recommended treatment” was due to an adverse finding on the issues of arising out and in the course of employment or whether timely notice of accident was given, then the Board would have jurisdiction of those issues. This finding is likewise implied in the ALJ’s Preliminary Decision. It is also suggested by the ALJ’s subsequent correspondence. But it also appears that the ALJ was reserving judgment on the compensability issues, and in particular, notice. What is not clear is whether the ALJ was denying all medical treatment benefits or just surgery. The subsequent denial of temporary total disability appears to have been on substantive rather than on procedural grounds, which suggests that the ALJ was not ordering respondent to provide the ongoing palliative treatment. It is also possible that the ALJ believed claimant was not unable to work unless he were to have the surgery. This record simply does not provide answers to the question of whether the Board has jurisdiction to review this appeal.

CONCLUSION

This matter is remanded to the ALJ for clarification and with directions that he provide specific findings of fact and conclusions of law on the issues presented to him at the preliminary hearing, which were:

1. Did claimant suffer personal injury or injuries by accident and, if so, on what date or dates?
2. Did claimant’s accidents and injuries arise out of and in the course of his employment with respondent?
3. Did claimant provide respondent with timely notice of accident?
4. Is claimant in need of medical treatment for his alleged work-related injuries? If so, what treatment is authorized?
5. Is claimant temporarily and totally disabled as a result of the alleged work-related injuries and, if so, for what period, if any, is temporary total disability due and ordered paid by respondent?

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Preliminary Decision of Administrative Law Judge Robert H. Foerschler dated July 2, 2007, is remanded to the ALJ for specific findings, conclusions and orders.

IT IS SO ORDERED.

Dated this _____ day of September, 2007.

BOARD MEMBER

c: Philip R. Carson, Attorney for Claimant
Wade A. Dorothy, Attorney for Respondent and its Insurance Carrier
Robert H. Foerschler, Administrative Law Judge